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In The Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, *et al.*,

Petitioners,

v.

KATHLEEN M. WINN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

REPLY BRIEF

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I. THE PANEL OPINION DIRECTLY CONFLICTS WITH THE ARIZONA SUPREME COURT'S DECISION IN *KOTTERMAN V. KILLIAN*

The Respondents' assertion that there is no conflict between the panel opinion and the Arizona Supreme Court is wrong.

A. The Panel Opinion Is In Direct Conflict With The Arizona Supreme Court's Holding That The Tuition Tax Credit Serves The Valid, Secular Purpose Of Expanding Educational Options For Parents Of Every Income Level

The panel opinion holds that Respondents have asserted a viable claim against Arizona's stated secular purpose for enacting the challenged tuition tax credit law. App. 19. The Arizona Supreme Court has already considered this question in the context of an Establishment Clause challenge. *Kotterman v. Killian,* 972 P.2d 606, 611-12 (Ariz. 1999). Without reservation, the Arizona Supreme Court declared that the tuition tax credit was enacted for a valid secular purpose. *Id.* The conflict between Arizona's highest court and the panel opinion could not be starker.

Respondents make two additional, significant errors regarding the secular purpose that motivated Arizona to enact the tuition tax credit. First, they argue that the tax credit was enacted solely to help low-income children and that a recent spate of newspaper articles with dubious conclusions demonstrate

a failure to achieve that purpose because a large number of children from middle-income families receive tax-credit-funded scholarships. Br. Opp'n 8-9. But the State did not intend the tuition tax credit to aid only low-income families. As the panel itself noted, the tax credit is intended to provide "equal access to a wide range of schooling options for students of *every* income level. . . ." App. 18 (emphasis added).

The State has never argued that "the Tuition Tax Credit will primarily benefit the poor," App. 61, nor did it enact the tuition tax credit solely as a means of aiding low-income families. Instead, as the Arizona Supreme Court emphasized, the tuition tax credit is part of a larger legislative agenda to "expand[ ] the options available in public education . . . [by] bring[ing] private institutions into the mix of educational alternatives open to the people of [Arizona]." *Kotterman*, 972 P.2d at 611.

Moreover, based on the newspapers' own reporting, the tax credit undeniably helps thousands of financially needy families. For example, the *Tribune* reported that at least seven School Tuition Organizations provide money exclusively to low-income families. Ryan Gabrielson and Michelle Reese, *Tax credit sponsor's vision unrealized*, East Valley Tribune, Aug. 7, 2009, at A6. While the article only named three of those seven organizations, those being the Petitioner-Intervenor Arizona School Choice Trust, the Catholic Tuition Organization of the Diocese of Phoenix, and the Catholic Tuition Organization for the Diocese of Tucson, those three organizations in 2008 controlled over one-third of all the

money available for scholarships and together awarded 9,719 scholarships. App. 221, 223.

The Respondents' final error is their reading of this Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), as requiring that private school choice programs be motivated by a purpose to rescue children from failing public schools. Br. Opp'n 1, 20-21. The Respondents' attempt to cabin *Zelman* to its specific facts while ignoring its logical underpinnings is strained and unpersuasive, not only in light of the precedent leading up to *Zelman*, but also in this Court's most recent post-*Zelman* decision.

This Court's pre-*Zelman* decisions identify numerous different, and completely valid, secular purposes. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 5 (1993) (providing education to handicapped children a valid secular purpose); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 485-86 (1986) (providing vocational rehabilitation services to the blind a valid secular purpose); *Mueller v. Allen*, 463 U.S. 388, 395 (1983) (defraying costs of private education a valid secular purpose); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973) (relieving overburdened public school system by providing financial aid to families who attend private schools a valid secular purpose). In *Locke v. Davey*, this Court unanimously held, pursuant to *Zelman*, that a post-secondary private school voucher designed to aid academically gifted students attend private colleges—and even to pursue degrees in devotional theology—passes muster under the Establishment Clause. *Locke v. Davey*, 540 U.S.

712, 719 (2004). That the secular purpose in *Zelman* was to rescue children from Cleveland's failing schools in no way suggests that that is the only purpose for which a state may enact educational aid programs. And as the District Court below wisely noted, "no useful purpose would be served by making the State wait until its schools were in the same kind of trouble as Cleveland's before implementing a program of true private choice." App. 62.

Respondents' continued focus on matters that are, in the District Court's words, "irrelevant to the constitutional analysis," App. 61, lays bare the fact that their case is not about vindicating constitutional rights, but rather it is an attempt to use the courts to halt a policy they do not like.

B. The Panel Opinion Is In Direct Conflict With The Arizona Supreme Court's Holding That The Tuition Tax Credit Does Not Involve State Funds Or State Appropriations

There is a fundamental conflict between the panel opinion and the Arizona Supreme Court's decision in *Kotterman* regarding the way tax-credit-eligible donations are viewed. *Kotterman* clearly views them as private funds and not public money. *Kotterman*, 972 P.2d at 618 ("[U]nder any common understanding we are not here dealing with 'public money.'"). The panel, however, rejected *Kotterman*'s conclusion. App. 13 ("[W]e reject the suggestion that this money is not publicly subsidized."). The panel

and the Arizona Supreme Court treat the money donated to School Tuition Organizations by taxpayers in a completely incompatible manner, necessitating review and resolution by this Court.

The Respondents try to transmute the tuition tax credit from a program of private charity into a government-run operation by arguing that Arizona relies on "non-governmental organizations . . . to award scholarships from state funds on its behalf." Br. Opp'n 4. Indeed, throughout their brief Respondents use deliberately misleading phrasing by talking about the tuition scholarships as public funds. *E.g.* Br. Opp'n 1, 22. This is nothing short of legal alchemy. Simply authorizing a tax credit for modest donations by third parties to School Tuition Organizations to fund tuition scholarships does not alter the private nature of the donations. Other than purely ministerial tasks, the State of Arizona plays no role in the administration or operation of the tuition tax credit. No state actor urges or encourages taxpayers to write a check to any School Tuition Organization. No state actors are involved in the establishment of School Tuition Organizations. It is entirely up to private individuals to establish these charitable organizations and to solicit donations from individuals.

As the Arizona Supreme Court explained, the argument that the government "effectively controls and exerts quasi-ownership" of taxpayers' money merely because those funds "*could* enter the [state] treasury . . . is fraught with problems." *Kotterman*, 972 P.2d at 618. The most glaring problem is that the

Respondents' argument "directly contradicts the decades-long acceptance of tax deductions for charitable contributions . . . made directly to churches, religiously-affiliated schools and institutions." *Id.* Respondents attempt to evade this problem by emphasizing that the challenged tax credit is dollar-for-dollar, whereas deductions reduce tax liability by a percentage of the donation. However, if Respondents' theory is correct, then a percentage of every donation by every individual to every charitable organization—including donations made directly to churches and religious institutions—constitute public money.

The panel and Respondents fail to appreciate the significance of the fact that School Tuition Organizations are federally recognized charitable organizations and that the tuition tax credit law, A.R.S. § 43-1089, merely allows School Tuition Organizations to operate like any other private charity that funds tuition scholarships. Every other similar charity retains the right to award scholarships only to kids attending particular religious schools and contributions to such religiously affiliated charities still qualify as a federally deductible charitable contribution. Neither the panel nor the Respondents have offered any justification for treating donations to scholarship-granting organizations that are eligible for a state tax credit as public funds on the one hand, while treating donations to scholarship-granting organizations that are eligible for a federal tax deduction as private funds on the other hand.

This Court should grant certiorari and reverse the panel opinion, which is a dramatic departure from settled law regarding the constitutionality of religiously neutral tax benefits.

II. THERE IS NO FACTUAL DISPUTE REGARDING THE TAX CREDIT'S OPERATION

The panel opinion and the Respondents try to create an ambiguity in the tuition tax credit law and in the Arizona Supreme Court's *Kotterman* decision where none exists. The Respondents assert that the Arizona Supreme Court assumed there would be no religiously affiliated School Tuition Organizations in Arizona. Br. Opp'n 15. That assertion is demonstrably false.

Both the majority opinion and the dissenting opinion in *Kotterman* understood that the tuition tax credit law allows School Tuition Organizations to organize themselves along religious lines so long as they award scholarships to at least two schools. The Respondents deliberately omit a full half of the quote in their parenthetical on page 15 of their opposition brief without even signaling to this Court with ellipses that they have omitted part of the sentence. The *Kotterman* majority's full quote is: "Every S[chool] T[uition] O[rganization] must allow its scholarship recipients to 'attend any qualified school of their parents' choice,' *and may not limit grants to students of only one [qualified school].*" *Kotterman*,

972 P.2d at 614 (emphasis added). The dissent was equally straightforward in its explanation of how the program would operate. It said, "In fact, a group of taxpayers who subscribe to a particular religion may form a[ ] S[chool] T[uition] O[rganization] that will support only schools of that religion." *Kotterman*, 972 P.2d at 626 (Feldman, J., dissenting).

Throughout their opinion, the *Kotterman* majority did not hesitate to respond to arguments made by the dissent. *E.g.*, *Kotterman*, 972 P.2d at 625 (responding to dissent's discussion of Washington State cases). However, the majority never quibbles with the dissent's characterization of the tuition tax credit as allowing religiously affiliated School Tuition Organizations to award scholarships only to religious schools. The obvious reason, based both on the majority opinion's clear understanding that School Tuition Organizations must give to at least two schools and on its silence with regard to the dissent's characterization of the tuition tax credit, is that the majority knew this is how the program would operate and still concluded the tuition tax credit was a religiously neutral program.

The simple fact is that no party to this case disputes the manner in which the tuition tax credit operates. The Respondents' suggestion that there is a fact question to be proved on remand with regard to how School Tuition Organizations in Arizona raise funds and issue scholarships is simply not true. Br. Opp'n 14. Taking every allegation in Respondents' Complaint, App. 195-205, as true, and construing

those allegations in the most favorable light, they have not stated a claim under the Establishment Clause for which relief may be granted. As this Court has "repeatedly recognized[,] . . . no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." *Zelman*, 536 U.S. at 654-55.

III. OTHER STATES ALLOW RELIGIOUSLY AFFILIATED TUITION ORGANIZATIONS TO OPERATE

Respondents are wrong that other states with tax credits for scholarship fund donations do not allow religiously affiliated scholarship-granting organizations to operate. Except Florida, every other third-party tuition tax credit program permits religiously affiliated scholarship-granting organizations to operate.[1] Clearly, these other programs could be affected

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[1] In Pennsylvania, the Catholic Conference Scholarship Foundation is "a scholarship foundation to help students attend Catholic schools in Pennsylvania." Pennsylvania Catholic Conference, *PCC Scholarship Foundation*, http://www.pacatholic.org/about-the-pcc/pcc-scholarship-foundation (last visited Apr. 30, 2010). In Georgia, the G.R.A.C.E. scholarship organization "offers families the prospect to access a faith based, academically strong, and community based Catholic school in the State of Georgia." G.R.A.C.E. Scholars, Inc., http://www.gracescholars.org (last visited Apr. 30, 2010). In Rhode Island, F.A.C.E. offers scholarships to 46 participating "Catholic elementary and

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by the panel decision. Respondents also claim that "[t]ax-related school choice programs" are typically personal use tax credits. That also is not true. Of the nine state education tax credit programs in operation, seven are third-party tax credits like Arizona's tuition tax credit and two are for personal use—and Iowa has both a personal use tax credit and a third-party tax credit. *See* 35 Ill. Comp. Stat. 5/210; Iowa Code § 422.12. Despite Respondents' claim that Arizona's tax credit is unique, the features that form the basis of their claims are, in fact, quite common.

The panel's decision is clearly erroneous. For the reasons stated in their Petition and herein, the Petitioner-Intervenors Arizona School Choice Trust, et al., respectfully request that their petition be

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secondary schools." Rhode Island Scholarship Alliance, *Scholarship Granting Organizations*, http://www.rischolarshipalliance.org/sgos/index.html (last visited Apr. 30, 2010). The "Our Faith, Our Future, Our Children School Tuition Organization" in Iowa is a Catholic organization serving 56 Catholic schools. Common Thread, *Giving the Gift of Catholic Education*, http://www.xavierfoundation.org/Downloads/xavier%20spring%20NL.pdf (last visited Apr. 30, 2010).

granted and urge this Court to summarily reverse the panel opinion.

Respectfully submitted,

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